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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALICE SVENSON, individually and on behalf
of all others similarly situated,

Case No. 5:13-cv-04080-BLF

v.
Plaintiff,
Google Inc., and Google Payment Corp.,
Defendants.

**PLAINTIFF'S NOTICE AND MOTION
TO MODIFY SCHEDULING ORDER
AND FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

Judge: Honorable Beth Labson Freeman

1 **NOTICE OF MOTION AND MOTION TO MODIFY SCHEDULING ORDER**
2 **AND FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

3 **PLEASE TAKE NOTICE** that on March 2, 2017, at 9:00 a.m., Plaintiff Alice Svenson
4 will appear, through counsel, before the Honorable Beth Labson Freeman, or any judge sitting in
5 her stead, in Courtroom 3, 5th Floor at the United States Courthouse for the Northern District of
6 California, San Jose Division, located at 280 South 1st Street, San Jose, California 95113, and will
7 move the Court to modify its scheduling order, and for leave to file a Second Amended Class
Action Complaint in this action.

8 This Motion is made pursuant to Federal Rules of Civil Procedure 15 and 16, and is based
9 upon this Notice and Motion, the accompanying Memorandum of Points and Authorities, all of the
10 documents and evidence in the record, and any oral argument that may be presented to the Court.

11 Respectfully submitted,

12 **ALICE SVENSON**, individually and on behalf of all
13 others similarly situated,

14 Dated: November 29, 2016

By: s/ J. Dominick Larry
One of Plaintiff's Attorneys

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION TO MODIFY SCHEDULING ORDER AND FOR
LEAVE TO FILE SECOND AMENDED COMPLAINT**

At the August 24, 2016 hearing on the motion for class certification filed by Plaintiff Alice Svenson and the motions for summary judgment and to exclude testimony filed by Defendants Google, Inc. and Google Payment Corp. (collectively “Defendants” or “Google”), the Court explained its concern regarding Plaintiff’s claim for damages, her standing to sue, and her typicality as a representative of the class, owing to her decision to re-purchase the mobile software application (“app”) at issue after filing her lawsuit. In response, Plaintiff’s counsel raised the possibility of a then-absent class member joining the suit as a named plaintiff and putative class representative, should Plaintiff’s claims fail to survive summary judgment or pass the typicality test for class certification. The Court recognized that potential option, noting that “if [it] rule[s] in [Defendants’] favor only on typicality, why would [it] do that . . . with prejudice?” (*See Transcript of August 24, 2016 Hearing, Ex. 1*,¹ at 83:20–23.)

Plaintiff now seeks leave to amend the scheduling order and to allow her to file a second amended complaint that conforms the class definition in the complaint to that proposed in her certification motion, and, more importantly, adds Adam Gurno as a named plaintiff and putative class representative. As anticipated by the Court during the August 24th hearing, Mr. Gurno's claims will not be subject to the same infirmities as Plaintiff Svenson's, because although he did continue to purchase apps through Defendants' platforms after this lawsuit was filed, he was unaware of Defendants' unlawful sharing at the time of the purchases. (*See* Ex. 2 at 77:17–18 (The Court noting, on the issue of whether absent class members were aware of the allegedly unlawful sharing, "I don't think we presume anybody else had that knowledge.").)

Plaintiff, her counsel, and Mr. Gurno worked diligently to bring this motion to the Court promptly. Shortly after the August 24th hearing, Plaintiff's counsel began fielding inquiries from class members interested in participating in the case as a named plaintiff and class representative. Upon being retained by Mr. Gurno, Plaintiff's counsel quickly obtained approval on a draft

¹ All references herein to exhibits refer to the Exhibits to the Declaration of J. Dominick Larry, filed contemporaneously herewith.

1 proposed second amended complaint, reached out to Defendants' counsel to determine whether
 2 they would oppose the filing of a second amended complaint, and prepared the instant motion for
 3 filing. As explained below, because Plaintiff acted diligently in seeking to amend, and because
 4 allowing the filing of the amended complaint would further the interests of justice by allowing the
 5 class to proceed with proper representation, the Court should grant Plaintiff's motion, and allow
 6 for the filing of the proposed Second Amended Complaint (a copy of which is attached hereto as
 7 Exhibit 2.).)

BACKGROUND

9 Plaintiff Alice Svenson filed her original complaint against Defendants on September 3,
 10 2013. (Dkt. 1.) Defendants moved to dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6), and
 11 on August 12, 2014, the Court denied the motion to dismiss under Rule 12(b)(1), while granting it
 12 under Rule 12(b)(6) with leave to amend in part. (Dkt. 83.) Plaintiff Svenson timely filed her
 13 Amended Complaint on September 2, 2014, (dkt. 84), and Defendants again moved to dismiss
 14 under Rules 12(b)(1) and 12(b)(6). (Dkt. 89.) The Court denied the motion in part on April 1,
 15 2015, (dkt. 118), and discovery on Svenson's remaining claims commenced shortly thereafter.

16 On June 3, 2016, Svenson moved for class certification. (Dkt. 159.) Defendants filed their
 17 response in opposition on July 8, 2016, and with it, a motion for summary judgment as to
 18 Plaintiff's individual claims. (Dkt. 164.) In their summary judgment motion, Defendants argued
 19 that Svenson was not damaged by their conduct, and that they had not in fact breached the privacy
 20 obligations in their terms of service and privacy policies. (*Id.*) On August 24, 2016, the Court held
 21 a hearing on Svenson's certification motion and on Defendants' motion for summary judgment.
 22 (*See Ex. 2.*) At the hearing, the Court focused heavily on a point that had only been addressed
 23 once in Defendants' summary judgment briefing (in a single sentence of the "factual background"
 24 section): whether Svenson could state a claim for damages under a benefit-of-the-bargain theory
 25 given that she purchased the app a second time after filing her lawsuit. (*See id.* at 7:20–8:3 ("And
 26 my biggest concern with her is that one of the major premises of the damages theory is that these
 27 privacy protections were an important part of the entire relationship between Google and the class
 28 members, and I think Ms. Svenson says at one point, if I had known that my privacy wasn't going

1 to be protected, I would not have engaged in this activity, which is completely belied by her
 2 activity after the case was filed in repurchasing what is, I gather, a very successful app for her
 3 purchases.”).

4 Repeatedly throughout the hearing, the Parties and the Court discussed the significance of
 5 Svenson’s re-purchase of the app, the effect of that purchase on the class’s certifiability (an
 6 argument not raised by Defendants in opposing class certification), and the propriety of
 7 substituting in a new named plaintiff. (*See, e.g., id.* at 45:24–46:21, 77:17–18.) Thus, recognizing
 8 the potential significance of the issue to the eventual outcome of the case, immediately following
 9 the hearing, Plaintiff’s counsel began to investigate the propriety of adding a new plaintiff (and the
 10 mechanism for doing so), and began interviewing additional individuals interested in acting as
 11 named plaintiffs and putative class representatives. (Larry Decl., ¶ 3.) Over the next several
 12 weeks, Plaintiff’s counsel began fielding inquiries from individuals interested in adding
 13 themselves to the litigation as named plaintiffs and class representatives. (*Id.* ¶ 4.)² After several
 14 conversations between Mr. Gurno and Plaintiff’s counsel, along with the review of several
 15 documents provided by him, Mr. Gurno retained Plaintiff’s counsel to represent him on November
 16 14, 2016. (*Id.*) That same day, Plaintiff’s counsel emailed Defendants’ counsel, seeking to confer
 17 regarding the proposed amendment. (*Id.* ¶ 15.) Two days later, the Parties conferred regarding
 18 Plaintiff’s intent to seek leave to amend her complaint. (*Id.* ¶ 6.) During that call, Plaintiff’s
 19 counsel explained the basis for the amendment, and also proposed a discovery plan whereby
 20 Defendants would not even need to serve new discovery requests as to Plaintiff Gurno in order
 21 obtain relevant information; Gurno would simply deem Defendants’ existing requests to Svenson
 22 applied to himself in full force and voluntarily provide his responses. (*Id.*) Plaintiff’s counsel also
 23 offered to allow Defendants to depose Gurno at any time of its choosing. (*Id.*) Nevertheless, at the
 24 conclusion of the call, Defendants’ counsel informed Plaintiff’s counsel that Defendants would not

25 ² It bears repeating that unlike the plaintiffs in *CashCall, Inc. v. Superior Court*, 159 Cal.
 26 App. 4th 273, 282 (2008), Plaintiff and her counsel here did not have the benefit of a class list or
 27 discovery that would allow them to contact potential class members directly regarding the suit.
 28 Instead, Plaintiff’s counsel had to respond to inquiries from class members and referring attorneys
 in order to identify potential new plaintiffs (including Gurno). (Larry Decl. ¶ 4.)

1 stipulate to the relief sought. (Larry Decl. ¶ 6.) The Parties further discussed scheduling issues
 2 over the next several days, and on November 29, 2016, Plaintiff filed the instant motion. (Larry
 3 Decl. ¶¶ 7, 9.)

4 **ARGUMENT**

5 Once the deadline to add or amend pleadings has passed, “any modification must be based
 6 on a showing of good cause.” *Id.* (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th
 7 Cir. 2000)). “While a court may take into account any prejudice to the party opposing
 8 modification of the scheduling order, the focus of the Rule 16(b) inquiry is upon the moving
 9 party’s reasons for seeking modification.” *In re W. States Wholesale Natural Gas Antitrust Litig.*,
 10 715 F.3d 716, 737 (9th Cir. 2013). “The ‘good cause’ evaluation ‘primarily considers the diligence
 11 of the party seeking the amendment.’” *Victor v. R.C. Bigelow, Inc.*, No. 13-cv-2976, 2015 WL
 12 4104609, at *1 (N.D. Cal. July 7, 2015) (quoting *In re W. States Wholesale Natural Gas Antitrust
 13 Litig.*, 715 F.3d at 737)). “If the party demonstrates ‘good cause,’ then the party must further
 14 demonstrate that leave to amend is appropriate under Federal Rule of Civil Procedure 15.” *Id.*
 15 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)). “While leave
 16 to amend under Rule 15(a) is liberally granted, the Court still must evaluate whether there has
 17 been undue delay, bad faith, or a dilatory motive; repeated failure to cure deficiencies; prejudice to
 18 the defendant; or if the amendment would be futile.” *Thomas v. San Francisco Travel Assoc.*, No.
 19 14-cv-3043, 2016 WL 861239, at *2 (N.D. Cal. Mar. 7, 2016) (citing *Foman v. Davis*, 371 U.S.
 20 178, 182 (1962)).

21 Under these standards, the Court should allow Plaintiff’s proposed amendment. Plaintiff
 22 and her counsel acted diligently to amend the complaint; the proposed amendment is rooted in the
 23 interests of justice, rather than any bad faith; Defendants will suffer no prejudice from allowing
 24 the amendment, especially in light of the fact that Mr. Gurno could otherwise institute a new
 25 action to pursue his claim; and, ultimately, the amendment is not futile, as Mr. Gurno’s allegations
 26 would avoid the problems identified by the Court regarding Svenson’s ability to recover damages.
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1 **I. Plaintiff Was Diligent in Seeking to Amend Her Complaint.**

2 The standard under Rule 16, and the first element of the analysis under Rule 15(a), focuses
 3 on the diligence of the moving party. *See Victor*, 2015 WL 4104609, at *1; *Thomas*, 2016 WL
 4 861239, at *2.

5 Here, there can be no doubt that Plaintiff acted diligently in seeking amendment. The
 6 impetus for Plaintiff's proposed amendment was the Court's hearing on Plaintiff's motion for
 7 class certification and Defendants' motion for summary judgment. There, the Court expressed
 8 skepticism that Plaintiff could establish the damages necessary to prevail on her claim, but
 9 acknowledged that a class member coming forward to act as a named plaintiff and putative
 10 representative may not have the same problem. (Ex. 2 at 77:17–18, 83:20–23.) Thereafter,
 11 Plaintiff's counsel began fielding inquiries from putative class members interested in acting as
 12 named plaintiffs and class representatives. (Larry Decl., ¶ 4.) Plaintiff's counsel then obtained
 13 Gurno's and Plaintiff Svenson's sign-off on the proposed Second Amended Complaint on
 14 November 13, 2016, and finalized the retention agreement the next day. (*Id.* ¶ 4.) That same day,
 15 Plaintiffs' counsel then reached out to counsel for Defendant to schedule a time to meet and confer
 16 regarding the proposed amendment. (*Id.* ¶ 5.) Two days later, that discussion took place, at which
 17 point Defendants' counsel stated that Defendants would not consent to the amendment. (*Id.* ¶ 6.)
 18 The Parties conferred regarding the logistics of briefing the instant motion over the several days,
 19 and Plaintiffs filed the motion shortly after the Thanksgiving holiday. (*Id.* ¶¶ 7, 8.)

20 In such circumstances, the requisite good cause is easily established. The Central District's
 21 decision in *Gould v. Motel 6, Inc.*, No. 09-cv-8157, 2011 WL 759472 (C.D. Cal. Feb. 22, 2011) is
 22 instructive in this matter. There, after the deadline to amend the pleadings and several months after
 23 learning the basis for the defendant's expected challenge to the class representatives' adequacy,
 24 the plaintiffs moved for leave to add a new plaintiff to avoid those adequacy issues. *Id.* As here,
 25 the plaintiffs were not provided with contact information for the putative class members to aid in
 26 identifying potential plaintiffs. *Id.* at *3. Instead, the plaintiffs there retained a private investigator
 27 to contact potential class members. *Id.* Ultimately, the Court found that the plaintiffs had been
 28 "diligent in attempting to find additional potential class representatives," and that the proposed

1 amendment was proper under Rule 15(a). *See Woods v. Vector Mktg. Corp.*, No. 14-cv-264, 2015
 2 WL 10707576, at *2 (N.D. Cal. June 5, 2015) (finding that Plaintiffs had not “unduly delayed in
 3 seeking amendment,” and that good cause existed where “Plaintiffs sought leave to substitute a
 4 new named plaintiff shortly after this Court dismissed the former representative on statutes of
 5 limitation grounds.”).

6 As in *Gould* and *Woods*, Plaintiff’s diligence in seeking to file her amended complaint
 7 should satisfy the good-cause standard here. Simply put, Plaintiff and her counsel began looking
 8 for an additional plaintiff and class representative immediately after the August 24th hearing, and
 9 filed the instant motion promptly after being retained by Mr. Gurno. Accordingly, Plaintiff has
 10 shown diligence necessary to establish “good cause.”

11 **II. There is No Bad Faith Underlying Plaintiff’s Proposed Amendment.**

12 Defendants cannot seriously contend that Plaintiff’s proposed amendment is the result of
 13 bad faith. “Bad faith or dilatory motive on the part of the movant can also justify denying leave to
 14 amend a pleading, 371 U.S. at 182[; *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843,
 15 856 (2d Cir. 1981)], but this factor requires an affirmative demonstration by the non-moving
 16 party.” *Roller Bearing Co. of Am., Inc. v. Am. Software, Inc.*, 570 F. Supp. 2d 376, 386 (D. Conn.
 17 2008). In addition to “dilatory motive,” bad faith exists where a plaintiff “assert[s] new claims that
 18 he knows are baseless,” *Powell v. Metro One Loss Prevention Servs. Grp. (Guard Div. NY), Inc.*,
 19 No. 12-cv-4221, 2013 WL 3956377, at *4 (S.D.N.Y. July 26, 2013); *see also Eldridge v.*
 20 *Rochester City School Dist.*, 968 F. Supp. 2d 546, 554–55 (W.D.N.Y. Sept. 13, 2013), or where a
 21 plaintiff engages in forum shopping, *see Hernandez v. DMSI Staffing, LLC*, 79 F. Supp. 3d 1054,
 22 1059–60 (N.D. Cal. 2015).

23 No such improper motive exists here. To start, Plaintiff is not seeking to delay the ultimate
 24 resolution of these proceedings. To the contrary, allowing amendment now will save time
 25 compared to the alternatives of waiting until after a ruling on summary judgment to add Mr.
 26 Gurno as a plaintiff, or Mr. Gurno filing a new class action in the event that summary judgment is
 27 granted against Svenson. Nor is forum shopping a concern. To the contrary, Plaintiff seeks to add
 28 Mr. Gurno’s claim to this action in order to maintain continuity with the existing litigation and

1 preserve resources. Accordingly, Plaintiff's proposed amendment simply cannot be construed as
 2 the product of bad faith.

3 **III. Defendants Will Not Be Substantially Prejudiced by the Proposed Amendment.**

4 "The party opposing amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). "To demonstrate prejudice, the non-moving
 5 party must show that it will be unfairly disadvantaged or deprived of the opportunity to present
 6 facts or evidence which it could have offered had the amendment been timely." *Azarbal v. Medica Center of Delaware, Inc.*, 724 F. Supp. 279, 285 (D. Del. 1989); *see also Evans Prod. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984) ("The principal test for prejudice in such situations
 7 is whether the opposing party was denied a fair opportunity to defend and to offer additional
 8 evidence on that different theory.") (collecting cases). "Prejudice to the opposing party would
 9 [also] result if they were required to conduct extensive additional discovery if the amendment
 10 were allowed." *Keiter v. Penn. Mut. Ins. Co.*, 900 F. Supp. 1339, 1342 (D. Haw. 1995) (citing
 11 *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973).

12 Here, no prejudice will result to Defendants from the proposed amendment. To start,
 13 Defendants will not be deprived of the opportunity to present any facts or evidence. Rather,
 14 Plaintiffs have already proposed a streamlined discovery process for exchanging information
 15 related to Plaintiff Gurno, (Larry Decl., ¶ 6.) and Defendants have three months before the
 16 deadline to move for summary judgment against Gurno. Nor will the amendment require
 17 Defendants to conduct extensive additional discovery. *See Keiter*, 900 F. Supp. at 1342. That is,
 18 under Plaintiff's proposal, Defendants will only have to engage in limited discovery relating to
 19 Plaintiff's experience, while relying on the existing discovery to provide the vast majority of the
 20 relevant facts. On the other hand, if the motion to amend is denied, and if Defendant's motion for
 21 summary judgment as to Plaintiff Svenson is granted, Gurno will be forced to file an entirely new
 22 lawsuit, which will surely cause more of a burden than the streamlined discovery proposed by
 23 Plaintiff's counsel here.
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1 Because Plaintiff's proposed amendment will neither deprive Defendants of the
 2 opportunity to present their defenses nor result in increased discovery, the motion for leave to
 3 amend should be granted.

4 **IV. The Proposed Amendment is Not Futile.**

5 Finally, the proposed amendment should be allowed because it is not futile. While
 6 challenges to pleadings "are usually deferred until after the pleading has been granted," some
 7 amendments may be futile where "'no set of facts can be proved under the amendment that would
 8 constitute a valid claim or defense.'" *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157 (N.D.
 9 Cal. 2005) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). Thus, for
 10 example, an amendment may be futile where a plaintiff lacks standing to bring a newly added
 11 allegation, or where a new claim is time-barred by an applicable statute of limitations. *See, e.g.,*
 12 *McGlamry v. Transmeta Corp.*, No. 04-cv-2475, 2005 WL 2216951, at *3 (N.D. Cal. July 25,
 13 2005) (citing *Toombs v. Leone*, 777 F.2d 465, 468 (9th Cir. 1985)).

14 No such circumstances exist here. Simply put, the proposed second amended complaint is
 15 comprised of the same causes of action as the prior complaint, and generally only serves to (i) add
 16 factual allegations specific to proposed-plaintiff Gurno, and (ii) conform the class definition to that
 17 contained in Plaintiff Svenson's motion for class certification. Furthermore, every count in the
 18 proposed second amended complaint (along with the allegations concerning Mr. Gurno) still
 19 concerns and challenges Defendants' compliance with their terms of service and privacy policies.
 20 As such, there is no question that the allegations of the proposed Second Amended Complaint
 21 "relate back" to the filing of the original complaint, for purposes of Rule 15(c). *See Fed. R. Civ. P.*
 22 15(c) ("An amendment to a pleading relates back to the date of the original pleading when . . . the
 23 amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set-
 24 out—or attempted to be set out—in the original pleading.").³

25 ³ To the extent Defendants argue that the amendment is futile because Mr. Gurno's claims
 26 fail for the reasons outlined in Defendants' motion for summary judgment, that simply proves the
 27 lack of prejudice to Defendants from allowing amendment. *See Stuart v. Radioshack Corp.*, No.
 28 07-cv-4499, 2009 WL 281941, at *3 (N.D. Cal. Feb. 5, 2009) ("[I]t is likely that RadioShack
 would make the same arguments in opposition to the motion for class certification even if the class

CONCLUSION

Accordingly, Plaintiff Alice Svenson respectfully requests that the Court enter an order (1) modifying the scheduling order to extend the deadline for amending pleadings and adding parties, (2) granting Plaintiff leave to file her proposed Second Amended Complaint, and (3) granting such other and further relief as the Court deems equitable and just.

Respectfully submitted,

ALICE SVENSON, individually and on behalf of all others similarly situated,

Dated: November 29, 2016

By: s/ J. Dominick Larry
One of Plaintiff's Attorneys

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definition were expanded. RadioShack admits as much when it contends that the proposed amendment is futile for the very reasons argued in its opposition to the motion for class certification.”)

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CERTIFICATE OF SERVICE

I, J. Dominick Larry, an attorney, hereby certify that on November 29, 2016, I electronically filed the above and foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By: s/ J. Dominick Larry